

No. 11364

United States

Circuit Court of Appeals

For the Ninth Circuit.

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Commanding Of-
ficer of the United States Naval Disciplinary
Barracks, Camp Shoemaker, California,
Appellant,

vs.

EDWARD A. DRAINER,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

OCT 1 - 1946

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

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Northern District of California.

Post Office Building,

San Francisco, California.

Attorney for Respondent and Appellant.

WOODROW W. KITCHEL, Esq.,

1704-5 Tribune Tower,

Oakland, California.

Attorney for Petitioner and Appellee.

District Court of the United States, Northern
District of California, Southern Division

No. 25589-R

In the Matter of the Application of
EDWARD A. DRAINER, for a Writ of Habeas
Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To The Honorable, The District Court of the United
States, Northern District of California, South-
ern Division:

The Petition of Edward A. Drainer respectfully
shows:

That the said Edward A. Drainer is unlawfully
imprisoned, detained and restrained of his liberty
by Captain E. F. Helnkamp (U. S. N.) Command-
ing Officer of the U. S. Navy Receiving Ship and
Captain Carl Benson (U. S. M. C.) in charge of
the Brig on Yerba Buena, Treasure Island in the
City and County of San Francisco, State of Cali-
fornia.

That said imprisonment, detention, confinement
and restraint are illegal and that the illegality
thereof consists in this, to wit:

That said petitioner above named was appre-
hended on November 7, 1945, in Arcata, California,
was brought to Treasure Island by the Naval Mili-
tary Authorities, was tried by a Naval Military
Court-Martial Board on Treasure Island and found
guilty of deserting the Naval Service on September

8, 1940, and by reason, therefore, is imprisoned, detained, confined and restrained on said Treasure Island. That at [1*] the time of said arrest said petitioner was a civilian and not a member of any branch of the Military Service. That the said Naval Authorities and Naval Court did not and does not have an jurisdiction over petitioner and, therefore, at this time is unlawfully detaining said petitioner, for said Naval jurisdiction ended and terminated when petitioner became separated from the Military Service by an honorable discharge which discharge took effect on or about November 1, 1944, upon the deliverance of a Certificate of Honorable Discharge from the United States Naval Service to said petitioner.

Further, said Naval Military Service and its officers and agents had no and have no jurisdiction over this petitioner and, therefore, have restrained, tried and now imprisoned and detained petitioner illegally, in that the desertion of which he was charged, tried, found guilty of, and now imprisoned for terminated on July 27, 1943, when said petitioner voluntarily re-entered the United States Naval Service, and by reason therefore, the Statute of Limitations of two years for the charge of desertion has already run out and had run out before November 7, 1945, when he was so apprehended.

That no prior application has been made for a Writ of Habeas Corpus in regard to the detention and restraint complained of in this application.

* Page numbering appearing at foot of page of original certified Transcript of Record.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may be granted, directed to the said Captain E. F. Helmkamp (U. S. N.) Commanding Officer of the Receiving Ship and Captain Carl Benson (U. S. M. C.) in charge of the Brig in the City and County of San Francisco, commanding said officers and each of them to have the body of Edward A. Drainer before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning said petitioner together with time and cause of his detention and said Writ; and that he, said Edward A. Drainer, may be restored to his liberty.

Dated this 23rd day of January, 1946.

WOODROW W. KITCHEL,
Attorney.

State of California,
County of Alameda—ss.

Woodrow W. Kitchel, being duly sworn on behalf of the petitioner above named says:

That he has read the foregoing Petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true; that the said petitioner is absent from the County of Alameda, State of California, where his

attorney resides, and the facts are within the knowledge of this affiant who is the agent of the said petitioner and therefore makes this affidavit.

Dated, January 23, 1946.

WOODROW W. KITCHEL,

[Seal] RUSSELL P. STUDEBAKER,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Jan. 23, 1946.

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

On reading and filing the Petition of Edward A. Drainer charging Captain E. F. Helmkamp (U. S. N.), Commanding Officer of the U. S. Navy Receiving Ship, and Captain Carl Benson (U. S. M. C.) in charge of the Brig on Yerba Buena, Treasure Island, in the City and County of San Francisco, State of California with unlawfully imprisoning, detaining and restraining said petitioner of his liberty, and sufficient cause appearing therefore, it is ordered that the said Captains Helmkamp and Benson be and appear before this Court, in open court, at the court room thereof on Monday the 28th day of January, 1946 at 2 o'clock P. M., to show cause why a Writ of Habeas Corpus should not be issued and this petitioner restored to full liberty as in said Petition requested.

It is hereby ordered that a copy of said Petition and of this order be served on the said Captains Helmkamp (U. S. N.) and Benson (U. S. M. C.) at least 3 days before said 28th day of January, 1946.

Dated this 23rd day of January, 1946.

MICHAEL J. ROCHE,

Judge of the District Court of the United States.

[Endorsed]: Filed Jan. 23, 1946.

[4]

[Title of District Court and Cause]

RETURN TO ORDER TO SHOW CAUSE

Come now Captain E. F. Helmkamp, United States Navy, Commanding Officer United States Navy Receiving Ship, and Captain Carl Benson, Captain United States Marine Corps in charge of the Brig, Yerba Buena Island, California, and Lieutenant Colonel Ernest H. Gould, United States Marine Corps, Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That Edward A. Drainer, hereinafter called "the

petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by your respondents under and by virtue of the sentence of the General Court-martial convened at the Naval Training Station and Distribution Center [5] San Francisco, California, made and entered on January 5, 1946.

II.

That attached hereto and made a part hereof as "Exhibit A" is the following:

Certified copy of the proceedings, finding and sentence of the General Court-martial in the case of Edward Arden Drainer, Private, United States Marine Corps, convened, San Francisco, California, by order of the Commandant, Twelfth Naval District and Commander Naval Operating Base, San Francisco, California.

Wherefore respondent prays that the petition for writ of habeas corpus herein be denied and the order to show cause, heretofore issued, discharged.

/s/ FRANK J. HENNESSY,

United States Attorney,
Attorney for Respondents.

EXHIBIT "A"

Department of the Navy
Office of the Judge Advocate General

BuPers

G. C. M. Endorsements

Form No. NAVJAG-273

The proceedings, findings, and sentence of the general court martial in the foregoing case of Drainer, Edward Arden, Pvt. USMC are, in the opinion of this office, legal.

Referred to the Commandant of the Marine Corps for comment as to disciplinary features.

JUDGE ADVOCATE GEN-
ERAL OF THE NAVY.

By direction

.....

290844

DGO-bjp

[Stamp]: Received 8 Feb 1946 Office of Judge Advocate General G. C. M. Section.

1st Endorsement: 7 February 1946

From: Commandant of the Marine Corps

To: The Secretary of the Navy

Returned, recommending the action indicated in item number 11.

1. Mitigate reduction in rank to reduction to the rank of

Exhibit "A"—(Continued)

2. Remit bad conduct discharge subject to months probation
 3. Remit sentence on months probation
 4. Reduce confinement with corresponding accessories to month
 5. Remit sentence entirely that accused may, as a separate and distinct action, be given an discharge, by copy of this endorsement the is authorized to discharge the accused upon receipt of letter from the Navy Department showing approval of this recommendation.
 6. Confine for a period of months in accordance with sentence and provided his conduct during the months confinement so warrants, restore to duty at expiration thereof on months probation as regards the unexecuted part of the sentence.
 7. Remit confinement with corresponding accessories except loss of pay of \$ per month for months. Total loss of pay \$
 8. In order that the sentence adjudged may be carried into effect, remit
- Adjudged by Count Martial approved
9. Concur with paragraph of Judge Advocate General's endorsement hereon, namely
 10. Approval of the proceeding, findings, and sentence

Exhibit "A"—(Continued)

11. Approval of the action taken by the convening authorities.

12. Mitigate dishonorable discharge to bad conduct discharge.

13. Remit confinement with corresponding accessories.

14. Remit reduction in rank.

15.

/s/ P. D. SHERMAN

By direction

.....

2nd Endorsement: Office of the Judge Advocate General

The Secretary of the Navy has this date approved the above recommendation.

JUDGE ADVOCATE GENERAL OF THE NAVY

By direction

.....

"Certified A True Copy."

G. R. MILLER,

Comdr. U. S. N. R.

Exhibit "A"—(Continued)

Department of the Navy
Office of the Judge Advocate General
Washington, D. C.

MM-Drainer, Edward A./A17-20

1(2-1-46) emm

4 Feb 1946

Respectfully referred to the Commandant, U. S. Marine Corps for comment as to disciplinary features with the information that, in the opinion of this office, the proceedings findings, and sentence of the general court martial in the foregoing case of Edward A. Drainer, private, U. S. Marine Corps, and the action of the convening, authority thereon, are legal.

/s/ O. S. COLCLOUGH

Judge Advocate General of
the Navy.

ND12-63-fn

A17-20

Docket No. 7876

District Staff Headquarters
Twelfth Naval District
San Francisco, California

12 January 1946

The proceedings, findings, and sentence of the general court martial in the foregoing case of Edward A. Drainer, private, U. S. Marine Corps, are approved.

The U. S. Naval Disciplinary Barracks, Naval

Exhibit "A"—(Continued)

Training and Distribution Center, Shoemaker, California, is designated as the place of confinement.

/s/ M. S. TISDALE,

Rear Admiral, U. S. Navy, Acting Commandant,
Twelfth Naval District and Commander, Naval
Operating Base.

Case of Edward A. Drainer, Private, U. S. Marine
Corps, 5 January 1946.

RECORD OF PROCEEDINGS OF A
GENERAL COURT MARTIAL

Convened at The Naval Training And Distribution
Center, San Francisco, California, By Order of
The Commandant, Twelfth Naval District, And
Commander, Naval Operating Base, San Fran-
cisco, California.

[Stamp]: Received 28 Jan. 1946. Office of Judge
Advocate General G. C. M. Section.

Copy furnished:

Letter sent to: General Accounting Office, Audit
Division, Washington, D. C. Commanding Officer,
U. S. Naval Disciplinary Barracks, Naval Training
& Distribution Center, Shoemaker, California, Jan.
22, 1945. [10]

Exhibit "A"—(Continued)

ND12-02-ml-jsf

A17-20/A2-12

Serial 64794

District Staff Headquarters

Twelfth Naval District

San Francisco, California

19 October 1945

From: Commandant, Twelfth Naval District, and
Commander, Naval Operating Base, San Francisco,
California.

To: Captain Harry A. McClure, U. S. Navy

Subject: Precept for General Court Martial.

1. Pursuant to the authority vested in me by the Secretary of the Navy (Navy Department's File A17-11 (I)/A17-20, dated 1 July 1944), a General Court Martial is hereby ordered to convene at the U. S. Naval Training and Distribution Center, San Francisco, California, on Monday, 22 October 1945, or as soon thereafter as practicable, for the trial of such persons as may be legally brought before it:

2. The court is composed of the following seven members, any five of whom are empowered to act, viz.: Captain Harry A. McClure, U. S. Navy, Captain Charles M. Yates, U. S. Navy, Captain Samuel S. Payne, U. S. Navy; Captain Stephan B. Robinson, U. S. Navy; Captain Leslie C. McNemar, S (I), U. S. Naval Reserve; Commander Arthur F. Anderson, U. S. Navy (Retired); Lieutenant Commander

Exhibit "A"—(Continued)

Harold C. Patton, U. S. Navy (Retired), and of Lieutenant Commander James F. Coakley, S(L), U. S. Naval Reserve, Lieutenant Commander Jerome P. Herst, S(L), U. S. Naval Reserve, Lieutenant Commander Gerald E. Veltmann, (D)L, U. S. Naval Reserve, Captain David F. Condon, Jr., U. S. Marine Corps Reserve, Lieutenant Edwin S. Wilson, (D)L, U. S. Naval Reserve, Lieutenant John A. Moore, (C)L, U. S. Naval Reserve, Lieutenant (junior grade) John T. Keenan, (D)L, U. S. Naval Reserve, Lieutenant (junior grade) LeRoy R. Krein, (C)L, U. S. Naval Reserve, and Lieutenant (junior grade) Edward H. Farrell, (S), U. S. Naval Reserve, as Judge Advocates, any one of whom is authorized to act.

3. No other officers can be detailed without injury to the service.

4. This court is hereby authorized and directed to take up such cases, if any, as may be now pending before the general court martial appointed by either one of my two precepts of 3 October 1945, except such cases the trial of which may have been commenced.

5. Detachment of an officer from his ship or station does not of itself relieve him from duty as a member of judge advocate of a court. Specific orders for such relief are necessary.

6. This employment on shore duty is required by the public interests. The court is authorized to

Exhibit "A"—(Continued)

adjourn over any holiday prescribed by Article 330, Navy Regulations, 1920.

/s/ C. H. WRIGHT,

Rear Admiral, U. S. Navy Commandant, Twelfth Naval District, and Commander, Naval Operating Base.

A true copy Attest:

/s/ EDWARD H. FARRELL,

Lieutenant (jg) USNR,

Judge Advocate. [11]

A17-20

(63-br-sc)

Docket No. 7876

District Staff Headquarters
Twelfth Naval District
San Francisco, California

28 November 1945

From: Commandant, Twelfth Naval District, and Commander, Naval Operating Base, San Francisco, California.

To: Judge Advocate, General Court Martial, U. S. Naval Training and Distribution Center, San Francisco, California.

Subject: Charge and Specifications in the case of Edward A. Drainer, private, U. S. Marine Corps.

1. The above-named man will be tried before the general court martial of which you are judge

Exhibit "A"—(Continued)

advocate, upon the following charge and specification. You will notify the president of the court accordingly, inform the accused of the date for his trial, and summon all witnesses, both for the prosecution and the defense, Charge Desertion Specification.

In that Edward A. Drainer, private, U. S. Marine Corps, while so serving at the Recruit Depot, U. S. Marine Corps Base, San Diego, California, did, on or about 8 September 1940, desert from said depot, and from the U. S. naval service, and did remain a deserter until he was delivered at the U. S. Marine Barracks, Treasure Island Activities, San Francisco, California, on or about 11 November 1945.

/s/ C. H. WRIGHT,

Rear Admiral, U. S. Navy Commandant Twelfth
Naval District and Commander Naval Oper-
ating Base. [12]

U. S. Naval Training and Distribution Center
San Francisco, California

Saturday, 5 January 1946

The court met at 10:58 a.m.

Present: Captain Harry A. McClure, U. S. Navy; Captain Charles M. Yates, U. S. Navy; Captain Samuel S. Payne, U. S. Navy; Captain Stephan B. Robinson, U. S. Navy; Captain Leslie C. McNemar, S(L), U. S. Naval Reserve; Commander Arthur F. Anderson, U. S. Navy (Retired); Lieu-

Exhibit "A"—(Continued)

tenant Commander Harold C. Patton, U. S. Navy (Retired), members; and Lieutenant (junior grade) Edward H. Farrell, U. S. Naval Reserve.

Lester D. Stout, shipfitter third class, U. S. Navy-Inductee, entered with the accused and reported as orderly.

The judge advocate introduced Boyd A. O'Brien as reporter.

The accused requested that Howard L. Martin, Lieutenant (junior grade), U. S. Naval Reserve, act as his counsel. Lieutenant (junior grade) Martin took seat as counsel for the accused.

The judge advocate submitted the precept, copy prefixed marked "A" to the accused for his information and inspection.

The accused stated that he did not object to any member.

The judge advocate, each member, and the reporter were duly sworn.

The accused stated that he received a copy of the charge and specification preferred against him on 30 December 1945.

The judge advocate asked the accused if he had any objection to make to the charge and specification.

The accused replied in the affirmative, stating that the court does not have any jurisdiction to hear this case. The court does not properly have jurisdiction on this accused. The facts being these: this accused is charged with desertion from the naval service in 1940, during the time of peace. I believe the

Exhibit "A"—(Continued)

record will show that he enlisted for a period of four years, consequently the statute of limitations would not begin to run until the end of his period of enlistment which would be done in 1944. We are not pleading limitation, the facts will be these: the accused returned to the naval service in the year 1943, on July 27th, and served in the Navy for a period of approximately fifteen months and then he was discharged honorable from U. S. Navy service, that the court has no jurisdiction over this accused. I read to the court from the Naval Courts and Boards, Section 334, in which it is provided that: "jurisdiction [13] of court martials over officers, midshipment, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge. However, a discharge obtained by fraud does not oust the jurisdiction of a court martial." However, that does not apply to the case here. The accused did not obtain a discharge by fraud. The fact is there was no discharge by fraud although there may have been a fraudulent enlistment. And it further provides in the second paragraph of the same article, that is, article 334, "except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service." This accused is charged with desertion, and desertion is laid under article 8 and not under article

Exhibit "A"—(Continued)

14; and consequently since he has received an honorable discharge from the naval service, he is no longer subject to court martial.

(The judge advocate replied): If the court please, the accused enlisted on August 8, 1940, to serve for a period of four years. For this period from August 8, 1940, until he enlisted in the Navy in 1943, he gives no excuse for being absent or any reason for it. The fact that he enlisted for four years show that there was a binding contract with the Navy Department. This is getting to a point where a man, if this objection is sustained, if he chooses one branch of the service and then decides he doesn't like it, he can join another. I submit that the acceptance of the enlistment by the Navy Department of this man in the Marine Corps does not amount to a waiver from the Navy Department because of the fact there was a fraudulent enlistment. The Navy Department would have to examine this prior enlistment and when it expired. I submit the fact that he received an honorable discharge does not bar any trial of jurisdiction of this case due to the fact that the binding contract between the accused and Navy Department had not been consummated therefore the accused is before the proper court for trial.

(By the court): "What was the date of his discharge?"

(By the accused): November of 1944.

(By the court): What day was his honorable discharge?

Exhibit "A"—(Continued)

(By the accused): 1st day of November 1944.
Yes, sir, this is an honorable medical discharge.

(By the court): And when did he enlist in the Marine Corps?

(By the accused): August 8, 1940.

(By the court): The Navy enlistment was July 27th of 1943?

(By the accused): Yes, sir, and for which he was given an honorable medical discharge.

(By the court): What name did he use?

(By the accused): Same name. The name on this honorable [14] discharge is "Edward Arden Drainer."

The court was cleared.

The court was opened and all parties to the trial entered.

The court announced that the objection of the accused was overruled, and that the court found the charge and specification in the form and technically correct.

(By the accused): Does the court wish me to go forward with the evidence at this time, that I have since the development of the case.

(By the court): The evidence of what?

(By the accused): The evidence of his return to the naval service and his discharge from the U. S. Naval Reserve.

(By the court): You may continue with any part of your defense. That has no bearing whatsoever on the proceedings. Plea in bar in this trial

Exhibit "A"—(Continued)

is out. Your objection has been overruled. Proceed in this case in due form.

The accused stated he was ready for trial.

No witnesses not otherwise connected with the trial were present.

The judge advocate read the letter containing the charge and specification, original prefixed marked "B," and arraigned the accused as follows:

Q. Edward A. Drainer, private, U. S. Marine Corps, you have heard the charge and specification preferred against you; how say you to the specification of the charge, guilty or not guilty?

A. Not guilty, sir.

Q. To the charge, guilty or not guilty?

A. Not guilty, sir.

The counsel for the accused stated that the accused admitted that he was Edward A. Drainer, that he was so serving at the Recruit Depot, U. S. Marine Corps Base, San Diego, California, on or about 8 September 1940.

The accused stated that this admission was made by his authority.

The prosecution began.

The judge advocate was called as a witness for the prosecution and was duly sworn.

Examined by the Judge Advocate:

Q. State your name, rank and present station.

A. Edward H. Farrell, lieutenant (junior grade), U. S. Naval Reserve, judge advocate of this court.

Q. If you recognize the accused, state as whom.

Exhibit "A"—(Continued)

A. I do; as Edward A. Drainer, Private, U. S. Marine Corps.

Q. If you are the legal custodian of the current service record of the accused, produce it.

A. I am; here, it is.

The witness produced the current record of the accused and it was submitted to the accused and to the court and by the judge advocate offered in evidence for the purpose of reading therefrom such extracts as may pertain to the offense for which the accused is now on trial.

There being no objections, it was so received.

Q. Refer to the current service record of the accused and read therefrom any entries pertaining to the prosecution of this case.

The witness read extracts from the said record, copy appended marked "Exhibit 1."

Q. If you were the legal custodian of the letter from the headquarters, U. S. Marine Corps, Washington, D. C., in this case, produce it.

A. I am, here it is.

The witness produced the said letter and it was submitted to the accused and to the court and by the judge advocate offered in evidence for the purpose of reading therefrom such extracts as may pertain to the offense for which the accused is now on trial.

There being no objection, it was so received.

Q. Refer to that letter report from Headquarters, U. S. Marine Corps, Washington, D. C., and read therefrom any extracts pertaining to this case.

Exhibit "A"—(Continued)

The witness read extracts from the said letter, copy appended marked "Exhibit 2."

The accused did not desire to cross-examine this witness.

Neither the judge advocate, the accused nor the court desired further to examine this witness.

The witness resumed his seat as judge advocate.

The prosecution rested.

The defense began.

The accused was, at his own request, duly sworn as a witness in his own behalf.

Examined by the Judge Advocate:

Q. Are you the accused in this case?

A. Yes, sir.

Examined by the Accused:

Q. Drainer, is it correct that you stayed on duty in the Marine Corps for exactly one month? Now, answer loud and talk to the court not to me.

A. Yes, sir. [16]

Q. You enlisted in the Marine Corps on 8 August 1940?

A. Yes, sir.

4. And on 8 September 1940 you absented yourself? A. Yes, sir.

Q. You were in boot-camp were you not?

A. - Yes, sir.

Q. How old were you at that time?

A. Just turning nineteen, sir.

Q. You were eighteen and soon to be nineteen?

A. Yes, sir.

Exhibit "A"—(Continued)

Q. When you left it, did you leave in company of anyone?

A. Yes, sir, there were two of us, two or three of us.

Q. State where you intended to go at that time?

A. I was leaving, homesick. I was going to go home.

Q. Where was your home?

A. Morgantown, West Virginia.

Q. How did you start traveling home?

A. Freight train, sir.

Q. Did you ever get home on that occasion?

A. No sir.

Q. Did you go straight home?

A. No, sir.

Q. Explain to the court what happened on that trip that kept you from getting home?

A. Well, when I got in Cedar Rapids I was pretty hungry. I didn't eat for a couple of days. Another fellow, about the same age and I got pretty hungry. I guess I was too proud to beg for something to eat. Both of us broke into a store to get groceries to eat. We got caught by the policeman and put in a county jail for two or three weeks. Then we were called by the magistrate and we plead guilty.

Q. What charge did you plead guilty to?

A. Breaking and entering.

Q. Were you sentenced on that charge?

A. Yes sir. They sentenced us ten years both.

Exhibit "A"—(Continued)

Q. Where were you confined after you had been sentenced?

A. Men's reformatory. Anamosa, Iowa.

Q. How long did you stay in that reformatory under that sentence?

A. Twenty-three or twenty-four months, sir.

Q. Do you recall the date you were released from the reformatory?

A. It was in the spring of 1943. I can't exactly remember that far back.

Q. Are you sure you know that it was in the spring of 1943?

A. No, sir. It was in the late fall of 1942. Yes, sir, it was in the late fall of 1942.

Q. All right. When you were released, where did you go? A. To Des Moines, Iowa.

Q. Did you ever get to go home?

A. No, sir, I never went home. I came to California.

Q. How long did you stay in Des Moines?

A. I stay at Des Moines about three months, sir.

Q. And immediately after you stayed there three months you came to California?

A. Yes, sir.

Q. What place in California?

A. Sacramento, California.

Q. And how long did you stay in Sacramento, California?

A. I was there until about April, 1943, and then I went back home.

Exhibit "A"—(Continued)

Q. By that to your home in Morgantown, West Virginia? A. Yes, sir; I did.

Q. How long did you stay in Morgantown, West Virginia before you returned to the Naval Service?

A. I stayed home there until about the middle of April until July, about the 24th, and I went down to see if I could get into the Navy.

Q. And where did you go to enlist?

A. I went to Fairmont, and from there to Clarksburg, West Virginia, to get our examination.

Q. And did you enlist there in the Navy at Clarksburg? A. Yes, sir.

Q. Was that enlistment on the 27th of July, 1943? A. Yes, sir.

Q. Did you enlist under your own name?

A. Yes, sir.

Q. Is that under the name of Edward Arden Drainer? A. Yes, sir.

Q. Did you serve on active duty from that time of your enlistment then until you finally received a discharge from the naval service?

A. Yes, sir, I did. [18]

Q. And was that discharge on the 1st of November, 1944? A. Yes, sir.

Q. I show you here what purports to be a photostatic copy of an honorable discharge. Will you identify that instrument I hand you?

A. Yes, sir.

Q. What is it?

A. It is my discharge, sir.

Exhibit "A"—(Continued)

Q. What serial number does that discharge have on it? A. C434324, sir.

Q. Where was this honorable discharge issued to you?

A. Philadelphia, sir; Philadelphia Navy Yard.

Q. Why did you receive a medical discharge from the Navy?

A. I went down with ulcers of the stomach, sir.

The photostatic copy of the said discharge was submitted to the judge advocate and to the court and by the accused offered in evidence.

There being no objection, it was so received, appended marked "Exhibit 3".

Q. After you obtained this discharge from the Navy, where did you go?

A. I went home. On the first of November I went home. I was there for twenty-seven days. Then I left for California and I went back to northern California, where I met a girl while I was there in the Navy.

Q. Did you marry this girl and settle up there?

A. Yes, sir. April 25, 1945.

Q. Did you live at that location from that period until the time you were arrested?

A. Yes, sir.

Q. On desertion? A. Yes, sir.

Q. Did you at any time after you left boot-camp back on 8 September, 1940, intend to permanently desert the naval service?

A. No, sir, I meant to come back. I got up to Iowa, got jailed, I told them I was in the Marine

Exhibit "A"—(Continued)

Corps. They found letters from my mother. I told them what they meant. They didn't seem to pay any attention to it. We never had a trial of any sort. We went to a magistrate. And he asked us if we were guilty. That was all there was to it. And then he sentenced us.

Q. You say you hadn't had a trial, no witness or anything?

A. No, sir, no witnesses, just a magistrate. [19]

Cross-Examined by the Judge Advocate:

Q. You testified that you got homesick and you went back to West Virginia? A. Yes, sir.

Q. In other words, you made up your mind to go home? A. Yes, sir.

Q. When you left you weren't in uniform, is that correct?

A. I had military pants and shirt, that's all.

Q. When you got to that place in Iowa, what kind of clothing did you have?

A. I think just a military shirt, that's all.

Q. When you enlisted in August, 1940, you enlisted for four years, is that right. In other words, knew you had been attached to the Marine Corps until August, 1944, is that right? A. Yes, sir.

Q. When you were picked up in Iowa, you just had your military pants?

A. No, sir, just a shirt.

Q. What did you have for pants?

A. Picked up civilian pants.

Q. Any other clothing?

A. Yes, sir, I had a leather jacket.

Exhibit "A"—(Continued)

Q. So you were more or less dressed in civilian clothing, is that right? A. Yes, sir.

Q. Did you have any identification as to be in the Marine Corps?

A. All I had for identification was a letter address to my mother.

Q. Did you wear an area bar?

A. No, sir.

Q. You couldn't prove you were a Marine?

A. No, sir.

Q. When you were released from prison, did they give you the same clothing or issue you clothing? A. I received a civilian suit.

Q. And you wore that suit at the time you went back to Sacramento? A. Yes, sir.

Q. Did you consider yourself, after your release from prison, a member of the Marine Corps?

A. I don't know. We never had any lectures on about desertion. [20]

Q. I didn't ask you that. I asked you if you still considered yourself a member of the Marine Corps?

A. Yes, and no. When I left there I knew I was still connected with it but didn't know what to do.

Q. You knew you had signed until 1944?

A. Yes, sir.

Q. You knew you were still connected with the Marine Corps, but didn't know what to do, is that right? A. Yes, sir.

Q. Did you go to your own home?

Exhibit "A"—(Continued)

A. Yes, sir, in 1943.

Q. Were your parents there? A. Yes, sir.

Q. Did they know you were in the Marine Corps?

A. Yes, sir, but they didn't know very much about the service, and I told them I was connected with them, that was all.

Q. So, at that time you considered yourself a member of the Corps? A. Yes, sir.

Q. What made you enlist in the naval service?

A. I deserted in peace time. I wanted to get in the best way I could. I wanted to get back in.

Q. When you enlisted did they ask you if you had previous military service? A. Yes, sir.

Q. What did you tell them? A. No.

Q. In other words, you had a fraudulent enlistment, is that right, A. Yes, sir.

Q. After you had been apprehended by civilian authorities in California, did you ever make any attempt to square yourself with the Marine Corps?

A. Yes, sir, that's what gave me the bad stomach. I was always worried about it.

Q. Then you knew you had signed up in the Marine Corps? A. Yes, sir.

Q. Did you make any plans to straighten yourself out with the Marine Corps? A. No, sir.

Q. In other words, you figured, is this right, you received an honorable discharge from the Navy so that cancelled your obligation to the Marine Corps?

A. No, sir, I never did figure it that way. [21]

Q. What did you figure?

Exhibit "A"—(Continued)

A. I don't know, sir. I was just afraid to go back. I didn't know what would happen to me.

Q. You already had a discharge from the Navy and you knew you still had an obligation to the Marine Corps and you were afraid to go back, is that right?

A. Yes, sir.

Examined by the Court:

Q. In July, 1943, when you enlisted in the Navy, you knew you were a deserter from the Marine Corps at that time?

A. Yes, sir.

Q. You say you came in because you wanted to do something in the war. Why didn't you return to the Marine Corps and tell the truth at that time?

A. I was afraid if I did I would never get in the service.

Q. Well, you also stated a minute ago that you thought the ulcers were caused by your worrying about the Corps, about your Marine Corps status?

A. Yes, sir. What I meant was I thought I probably got it through the bad stomach of mine. I worried about it after I was in the Marine Corps.

Q. You worried about it since you were in the Navy?

A. Yes, sir, that's when I came down with it, overseas.

Q. If you had these ulcers when you enlisted in the Navy, why didn't you say so?

A. I was afraid I couldn't get in, that is the only excuse I had.

Q. How far did you go in school?

A. I finished the sixth grade, sir.

Exhibit "A"—(Continued)

Q. Why did you get rid of your Marine uniform immediately after you left San Diego heading east?

A. I don't know. I wanted to get home. I figured I might get caught with it somewhere.

Q. Did you ever register for the draft?

A. Yes, sir, when I got discharged from the Navy.

Q. Did you ever serve overseas on this enlistment in the Navy?

A. Yes, sir, about six months. I was on New Hebrides Island.

Q. Were you stationed there on a ship?

A. No, sir.

Q. What was your rate?

A. Seaman first class, sir. [22]

Q. You weren't in the SeaBees, were you?

A. No, sir, naval aviation.

Q. Naval Aviation? A. Yes, sir.

Re-examined by the Accused:

Q. When you enlisted in the Navy in 1943, did you make any misrepresentation of any kind with reference to your status other than your date of birth and the fact that you had no evidence of being in military service before. Those were the only two misrepresentations you made?

A. Yes, sir.

Q. What misrepresentation did you make other than your date of birth and the fact that you never had been in the service?

A. My being in jail, that is the only other one.

Q. You gave them your home address?

A. Yes, sir.

Exhibit "A"—(Continued)

Q. Your correct home? A. Yes, sir.

Q. The correct place where you had been born?

A. Yes, sir.

Q. Did they finger-print you? A. Yes, sir.

Q. Have you any idea how you happened to be picked up? A. No, sir, I don't.

Neither the accused, the judge advocate nor the court desired further to examine this witness.

The witness said that he had nothing further to state; the witness resumed his status as accused.

The defense rested.

The accused did not desire to make a statement.

The judge advocate made the following opening argument:

If the court please, in way of argument, this is probably one of the most unusual cases we have had in this court for some time. I submit the fact that the accused was patriotic in joining up in the Navy, and that he received an honorable discharge from the naval service; but I still want to call the court's attention to the fact that he knew on 8 August, 1940 when he signed up with the Marine Corps for four years that he had a binding contract with the Navy Department. The accused should therefore be found guilty as charged for desertion from the Marine Corps on or about 8 September, 1940. [23]

The accused made the following argument:

May it please the court, under the law and facts of this case, I submit the accused is not guilty of anything. It is true he left the naval service in 1940. That is in the specification, "deserted from

Exhibit "A"—(Continued)

the U.S. naval service, and did remain a deserter until he was apprehended on or about 11 November, 1945"; and yet, in fact, the clear and undisputed evidence shows that he did not remain a deserter from the naval service from that date. This is shown by the fact he came back to the Navy and served for fifteen months until receiving an honorable discharge, which is in evidence. It is this kind of case that the law stated in the Naval Courts and Boards is intended to cover. "Except for offenses provided for in article 14, A.G.N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service." Because of the fact that desertion is not a charge that is under Article 14, of A.G.N., he should no longer be held to answer to this offense with which he is charged. Now, there has been some evidence of fraudulent enlistment in this case. But the accused is not being tried on the charge of fraudulent enlistment. Certainly, he told two or three falsehoods in order to return to the naval service because he deeply regretted, he admits, the fact that he left the naval service and got himself into trouble and was put into a men's reformatory school. He came back to the naval service, when his country was in its greatest need. With the United States being in a state of war, he came back and served his country honorably and it was certainly, in my humble opinion, a return to the naval service. And under the law,

Exhibit "A"—(Continued)

this court does not have the power at this time to try the accused and legally convict him.

The judge advocate made the following closing argument:

I would like to read to the court from the revised statute, Laws Relating to the Navy, by Melling, Section 1426, under the heading of Effect of Discharge. From that I quote "A discharge from the Navy operates in bar of trial for a previous desertion from the Navy, but not in bar of a previous offense committed in the Marine Corps. They are distinct branches of the service, and a discharge from the former does not operate as a discharge from the latter."

(By the Court): What is the date of that quotation?

(By the Judge Advocate): February 20, 1912.

The trial was finished.

The court was cleared. [24]

The judge advocate was recalled and delivered to record the following findings:

The specification of the charge proved in part proved except the words "he was deliver at the U.S. Marine Barracks. Treasure Island Activities, San Francisco, California on or about 11 November, 1945", which words are not proved, and for which the court substitutes the words "on or about 27 July, 1943, when he was accepted for enlistment in the U.S. Naval Service" which words are proved.

And that the accused, Edward A. Drainer, private, U.S. Marine Corps, is of the charge guilty.

Exhibit "A"—(Continued)

The court was opened and all parties to the trial entered.

The judge advocate was recalled as a witness for the defense in matters of mitigation and was warned that the oath previously taken by him was still binding.

Examined by the Accused:

Q. Do you have in your possession at this time, as legal custodian, an official statement of honorable service in the Navy pertaining to this accused?

A. I do; here it is.

The official statement was submitted to the accused and to the court and by the judge advocate offered in evidence.

There being no objection, it was so received, original appended marked "Exhibit 4".

Q. Will you read that statement to the court.

The witness read the said statement to the court.

The judge advocate did not desire to cross-examine this witness.

Neither the accused, the judge advocate nor the court desired further to examine this witness.

The witness resumed his seat as judge advocate.

The judge advocate stated that he had no record of previous conviction, that the rate of pay of the accused is \$52.50 a month, and that he enlisted on 8 August, 1940, to serve for four years, enlistment extended by A-Nav 155-1941, and was called to active duty on the same date, and gave as his date of birth 19 October, 1921.

The court was cleared. [25]

Exhibit "A"—(Continued)

The judge advocate was recalled and directed to record the sentence of the court as follows: The court therefore sentences him, Edward A. Drainer, private, U.S. Marine Corps, to be confined for a period of eighteen (28) months, to be dishonorably discharged from the United States naval service and to suffer all the other accessories of said sentence as prescribed by section 622, Naval Courts and Boards.

H. A. McCLURE,

Captain, U.S. Navy, President.

C. M. YATES,

Captain, U.S. Navy, Member

SAMUEL S. PAYNE,

Captain, U.S. Navy, Member

STEPHAN B. ROBINSON

Captain, U.S. Navy, Member

LESLIE C. McNEMAR

Captain, S(L), U.S. Naval Reserve, Member.

ARTHUR F. ANDERSON,

Commander, U.S. Navy, Retired,
Member.

HAROLD C. PATTON,

Lieutenant Commander, U. S.
Navy, Retired, Member,

EDWARD H. FERRELL,

Lieutenant (junior grade), U.S.
Naval Reserve, Judge Advocate.

Exhibit "A"—(Continued)

In consideration of his youth and subsequent honorable service in the Navy, we recommend Edward A. Drainer, private, U.S. Marine Corps, to the clemency of the reviewing authority.

CHARLES M. YATES,

Captain, U.S. Navy, Member

STEPHAN B. ROBINSON,

Captain, U.S. Navy, Member.

LESLIE C. McNEMAR,

Captain, S(L), U.S. Naval Reserve, Member.

HAROLD C. PATTON,

Lieutenant Commander, U.S. Navy, Retired, Member.

The court then at 12:00 adjourned until 10 a.m., until Monday, 7 January, 1946.

H. A. McCLURE

Captain, U.S. Navy, President.

EDWARD H. FARRELL,

Lieutenant (junior grade), U.S. Naval Reserve, Judge Advocate.

Exhibit "A"—(Continued)

EXHIBIT No. 1

Extract from the Current Service Record of Edward A. Drainer, Private, U.S. Marine Corps.

Page 10

19 Sep., 40 — while serving with Recruit Depot, M.C.B., San Diego, California. AWOL since 9:00 p.m., 8 Sep 40 — Not known to have disposed of effects; no secret preparations known to have been made; not known to have made any declarations, did not express desire to quit service; not known to have taken passage for a distant point; did not escape from arrest; did not commit any offense and was not in fear of punishment therefor, no secret effects of value left behind; Declared a deserter from Recruit Depot, M.C.B., San Diego, Calif. At 9:00 p.m. 8 Sep 40. Deserter Reward of \$50.00 offered, 19 September 1940.

/s/ T. M. RYAN,

Captain, U.S.M.C.

A true copy. Attest:

/s/ EDWARD H. FARRELL,

Lieutenant (junior grade), U.S. Naval Reserve,
Judge Advocate. [28]

Exhibit "A"—(Continued)

EXHIBIT No. 2

290844

DGO-362-cfv

Headquarters, U.S. Marine Corps
Washington 25 D.C.

20 November 1945

From: Director of Personnel, Marine Corps, (Discipline Division)

To: The Commanding Officer, Marine Barracks,
Treasure Island Activities, San Francisco, California.

Subject: Delivery of Private Edward Arden Drainer (290844) USMC, Deserter.

Reference: (a) your report to MARPAC serial #4681, dated 13 November 1945, same subject.

(b) Memo from Investigating Section to Discipline Division, dated 16 November 1945.

Enclosures: (3) References (a), (b) and service record book.

1. Please have Private Edward Arden Drainer, USMC, taken up on the rolls of the Marine Barracks, Treasure Island Activities, San Francisco, Calif., and take such disciplinary action as may be deemed appropriate in his case. Attention is invited to the provisions of Article 7-21, Marine Corps Manual which will be promptly complied with whenever applicable.

Exhibit "A"—(Continued)

2. The records show that this man deserted 8 September 1940, while serving with Recruit Depot, Marine Corps Base, San Diego, Calif., remaining absent until 4:00 p.m., 11 November 1945, when he was delivered at the Marine Barracks, Treasure Island, Activities, San Francisco, Calif., by the civil authorities of Humboldt County, Calif.

3. In the event the accounts of this man have been transferred to the Deserters' Roll, they will be returned or furnished by the Paymaster General of the Marine Corps.

/s/ L. T. WOLTRING,

By direction.

A true copy. Attest:

/s/ EDWARD H. FARRELL,

Lieutenant (junior grade), U. S. Naval Reserve,
Judge Advocate. [29]

EXHIBIT No. 3

C434324

Series C

HONORABLE DISCHARGE
from the United States Navy

This is to certify that Edward Arden Drainer a Seaman, First Class is Honorably Discharged from the U.S. Receiving Station, Navy Yard, Philadelphia, Pa. and from the Naval Service of the United States this 1st day of November, 1944.

Exhibit "A"—(Continued)

This certificate is awarded as a Testimonial of Fidelity and Obedience.

1 November 1944: Issued Honorable Discharge Lapel Button this date RS, NYd, Phila., Pa.

[Seal] /s/ C. M. HALL,

Captain, USN, Commanding

/s/ H. J. SHIELDS,

Comdr., USN (Ret)

NavPers 660 (Revised July 1943)

Enlisted as Apprentice Seaman 27 July 1943.

At Clarksburg, W. Va. for two (2) years.

Born 19 October 1925 at Gypsy, W. Va.

Qualification: Those of rating. Rating held, AS, S2c, S1c. Certificates None. Trade Schools completed None. Special duties for which qualified None.

Service (vessels and stations served on) or (served satisfactorily on active duty from 27 July 1943 to 1 November 1944) NRS. Clarksburg, W. Va.: NTS Great Lakes, Ill.; NavPers Dist. Cen.: Pleasanton, Cal.; RB, Shoemaker. Cal.; Utility Squadron Two; USNH, No Three; USNH, Oakland, Cal.; USNCH, Yosemite, Cal.; RS, NYd, Phila., Pa.

Rating at discharge: S1c

(Service Number): 755 86 05.

Exhibit "A"—(Continued)

Character of service: Excellent.

Final average: 3.75.

/s/ H. J. SHIELDS,
Commander, USN (Ret) and
Executive Officer.

Height: 5 ft 7 in. Weight: 145 lb. Eyes: Blue.
Hair: Blonde. Complexion: Ruddy. Personal
marks, etc.: VS on left arm, Ps on back, S $\frac{1}{2}$ " on
left knee.

Is physically qualified for discharge. Requires
treatment but not hospitalization.

I certify that this the the actual print of the
right index finger of the man herein mentioned.

/s/ J. P. BOWLES,
Capt. (MC) USN and Medi-
cal Officer.

Monthly rate of pay when discharged: \$66.00.

I hereby certify that the within named man has
been furnished travel allowance at the rate of .05
cents per mile from Phila. Pa. to Fairmont, W. Va.
and paid \$91.42 in full to date of discharge.

Total net service for pay purposes: 01 years, 03
months, 04 days.

Edward A. Drainer
(Signature of man)

/s/ GEO. M. LANDERS,
APC, USN. Ret. and Disbursing Officer for Fred
C. Burris, Lieut. (SC) USNR.

Exhibit "A"—(Continued)

State of West Virginia

Monongalia County, To Wit:

I, A. R. Martin, Clerk of the County Court of the County aforesaid do certify that the aforesaid writing; together with the certificates and \$ none cancelled Internal Revenue Stamps, thereto attached was this day presented to me in my office, and was admitted to record therein at 1:18 o'clock p.m.

Given under my hand this 2nd day of November, 1944:

A. R. MARTIN,
Clerk.

Paid Mop \$100.00, 1/11/44 C. W. Palmer, APC
USN Ret For Fred C. Burris, Lieut SC USNR

[Stamp]: Received Nov. 2 18 PM '44, County
Clerk, Monongalia Co.

EXHIBIT No. 4

Department of the Navy
Bureau of Naval Personnel
Washington 25, D.C.

CERTIFICATE

(For use in Naval courts martial, See Sec. 196,
Naval Courts and Boards.)

I hereby certify that the attached is a true statement of service of Edward Arden Drainer, as shown by the records, on file in this Bureau.

Exhibit "A"—(Continued)

In Witness Whereof. I have hereunto set my hand and caused the Seal of the Bureau of Naval Personnel to be affixed this 20th day of December, one thousand nine hundred and forty-five.

[Seal]

LOUIS DENFELD,

Chief of Naval Personnel.

NavPers-2096

Statement of service of Edward Arden Drainer, ex-S1c, USNR: Drainer enlisted in the Naval Reserve 27 July 1943 for two years. He served with a clear record until November 1944 when he was honorably discharged by reason of Medical Survey. On Discharge he received an average final mark of 3.75.

U. S. Naval Training and
Distribution Center
San Francisco, California.

Tuesday, 8 January 1946.

I hereby acknowledge the receipts of a copy of the record of proceedings of my trial by general court martial held 5 January 1946.

/s/ EDWARD A. DRAINER,

Private, USMC.

[Endorsed]: Filed Feb. 25, 1946. [37]

[Title of District Court and Cause.]

ANSWER TO RETURN TO ORDER
TO SHOW CAUSE

Comes now Edward A. Drainer, the petitioner herein, and for his reply to the Answer of said respondents in this cause filed denies, each and every, all and singular, generally and specifically, the allegations contained therein.

And for a second and further reply to the said Answer this petitioner alleges that said United States Naval Service had no jurisdiction over this petitioner at the time of the convening of the General Court-Martial referred to in said Return in that said petitioner on the first day of November, 1944 received an honorable discharge from the Naval Service of the United States at Philadelphia, Pennsylvania.

And for a third and further reply to the said Answer this petitioner alleges that the Statute of Limitations had already run on the cause for which petitioner was apprehended on November 7, 1945.

By reason whereof all the proceedings, acts and things done in restraining and depriving this petitioner of his liberty and his present imprisonment were and are wholly [38] illegal, unauthorized and void; and these are the same acts, judgments, orders, and proceedings as are mentioned and alleged in the said Answer.

Wherefore, petitioner prays a Writ of Habeas Corpus may be granted and said Edward A. Drainer

may be restored to his liberty as set forth in the
Petition on file herein.

WOODROW W. KITCHEL,

Attorney For Petitioner.

State of California,
County of Alameda—ss.

Woodrow W. Kitchel, being first duly sworn, deposes and says:

That he is the attorney for the petitioner in the above-entitled action and matter and makes this verification for and on behalf of petitioner for the reason that petitioner is without the City of Oakland wherein affiant maintains his law office;

That he has read the foregoing Answer To Return To Order To Show Cause and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information and belief, and as to those matters he believes it to be true.

WOODROW W. KITCHEL

Subscribed and sworn to before me this 28th day
of February, 1946.

[Seal] FRED B. MELLMANN,

Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Mar. 4, 1946. [39]

[Title of District Court and Cause.]

Application for a writ of habeas corpus. Writ granted and petitioner discharged from custody in accordance with opinion.

Woodrow W. Kitchel of Oakland, California, attorney for petitioner.

Frank J. Hennessy, United States Attorney, and Joseph Karesh, Assistant United States Attorney, both of San Francisco, California, attorneys for respondent.

MEMORANDUM OPINION

Roche, District Judge: This is an application for writ of habeas corpus whereby the petitioner, Edward A. Drainer, seeks to be released from imprisonment by the United States Naval Authorities. The imprisonment is pursuant to sentence by General Court Martial on the charge of desertion from the U.S. Naval Service. In his petition Drainer alleges lack of jurisdiction [40] on the ground that at the time of his arrest by civilian authorities and trial he had been separated from the military service by an honorable discharge and further, that the prosecution was barred by the two year statute of limitations. The record discloses the following facts:

On August 8, 1940, Drainer, then 18 years old, enlisted in the U.S. Marine Corps at Des Moines Iowa, for a period of four years. He was sent to San Diego, California, for training and after serving one month he absented himself without leave.

He was thereupon declared a deserter as of September 8, 1940.

It appears from his testimony before the Court Martial Board that he left because he was homesick and wanted to return to his home in West Virginia; that he got as far as Cedar Rapids, Iowa, by riding freight trains; that he was hungry and without funds; that in order to get food he and his companion broke the window of a grocery store, that they were arrested, charged with breaking and entering and sentenced to the reformatory, from which Drainer was released after serving two years. He further testified that after his release he spent several months in Sacramento, California, and then visited his family in West Virginia. By this time the United States was at war and the petitioner, who had left his country's service in time of peace, was anxious to return.

Accordingly, on July 27, 1943, the petitioner, now being 21 years of age, voluntarily enlisted in the U. S. Navy at Clarksburg, West Virginia. In so enlisting, he gave his true name and address but gave his age as 17, in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service. While this might constitute a fraudulent enlistment, it was no part of the specification on which the petitioner was tried.

On November 1, 1944, after almost a year and a half of honorable service, eight months of which was spent overseas in the South Pacific Area, peti-

tioner was given an Honorable Medical [41] Discharge from the U. S. Naval Service.

On November 7, 1945, petitioner, now a married man and regularly employed in Arcata, California, was apprehended by civilian authorities, returned to Treasure Island, tried and found guilty of desertion from the U. S. Naval Service during the period from September 8, 1940, to July 27, 1943. He was sentenced to eighteen months imprisonment at the conclusion of which he shall receive a Dishonorable Discharge from the United States Naval Service.

The question is whether a civilian, regularly separated from the service, can be tried by Court Martial for a desertion committed prior to his receipt of an Honorable Discharge.

It is the general rule that a person is amenable to the military jurisdiction only during the period of his service. *U.S. v. McDonald*, 265 Fed. 695; *Naval Courts and Boards*, Section 334 at page 92; *Winthrop, Military Law and Precedence*, 2nd Ed. (1920) at page 89. And once honorably discharged, such Honorable Discharge is a "formal, final judgment passed by the government upon the entire military record" of the person. *U. S. v. Kelly*, 82 U.S. 36.

That an Honorable Discharge from the U. S. Naval Service would not be a "formal, final judgment" upon the person's service record with the Army is, of course, true. They are two separate and distinct branches of the military service, each with its own

Secretary as administrative head. The U.S. Marine Corps, however, is not a separate branch of the service. It is a part of the Navy and is, by statute, made subject to the laws and regulations of the U.S. Navy. 34 U.S.C.A. 715. In *U.S. v. Dunn*, 120 U.S. 249, the Supreme Court considered the status of the Marine Corps and held that it was a part of the Naval Service and that service by an officer of the Navy as an enlisted man in the Marine Corps was to be credited to him in calculating his longevity pay.

It will be noted that the petitioner was not charged with desertion from the Marine Corps. He was charged with [42] desertion from the U.S. Naval Service. On July 27, 1943, he enlisted in the U.S. Naval Service. On November 1, 1944, he was honorably discharged from the U.S. Naval Service.

If respondent's contention that the Marine Corps is a separate branch of the service is correct, then the Court Martial Board had no jurisdiction to try petitioner on a charge of desertion from the U.S. Naval Service. If respondent's contention is not correct, prosecution for desertion from the U.S. Naval Service after petitioner had received an Honorable Discharge from the U.S. Naval Service is barred by such Honorable Discharge.

In support of his contention the respondent relies primarily on the decisions of the Judge Advocate General, citing Melling's "Law Relating to the Navy", and argues that an administration interpretation of the statute is entitled to great weight in the courts. This is true, but an interpretation that

is not required by the statute itself nor supported by judicial decision fails to carry the same weight. Such an interpretation is not binding on the Court.

Wherefore, the petition for a writ of habeas corpus will be granted and the petitioner will be discharged; but pending an appeal from the decision of this court he shall be enlarged upon recognizance with surety in the sum of \$100.00 for appearance to answer the judgment of the appellate court, in accordance with Rule 29 of the Rules of Court for the Ninth Circuit.

Dated: April 16, 1946.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 16, 1946. [43]

[Title of District Court and Cause.]

ON HABEAS CORPUS

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here Ordered that the said named person in whose behalf the Writ of Habeas Corpus was sued out is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from

which he has been produced, and that he go hence without delay.

Entered this 16th day of April, 1946.

[Seal] C. W. CALBREATH,
 Clerk.

(Return of Service of Writ attached.)

[Endorsed]: Filed Apr. 25, 1946. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS.

Notice is hereby given that Lieutenant Colonel Ernest H. Gould, United States Marine Corps Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, the respondent in the above-entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order and opinion of the Honorable Michael J. Roche, United States District Judge for the Northern District of California, discharging the petitioner, made and entered in the above-entitled action on April 16, 1946.

/s/ FRANK J. HENNESSY,
 United States Attorney,

/s/ JOSEPH KARESH,
 Assistant United States At-
 torney,
 Attorneys for Respondent.

[Endorsed]: Filed Apr. 17, 1946. [46]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including July 6, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 27, 1946.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 27, 1946. [47]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 47 pages, numbering from 1 to 47, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of the Application of Edward A. Drainer for a Writ of Habeas Corpus No. 25589 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$18.00 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 25th day of June, A.D. 1946.

C. W. CALBREATH,
Clerk.

[Seal] M. E. VAN BUREN
Deputy Clerk.

[Endorsed]: No. 11364. United States Circuit Court of Appeals for the Ninth Circuit. Lieutenant Colonel Ernest H. Gould, United States Marine Corps., Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, Appellant, vs. Edward A. Drainer, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 25, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,364

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps., Commanding Of-
ficer United States Naval Disciplinary Bar-
racks, Camp Shoemaker, California,
Appellant,

vs.

EDWARD H. DRAINER,
Appellee.

STATEMENT OF POINTS TO BE RELIED
ON IN APPEAL AND DESIGNATION OF
CONTENTS OF RECORD TO BE
PRINTED

Lieutenant Colonel Ernest H. Gould, United States Marine Corps, Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, appellant herein, designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon by him on appeal:

(1) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have denied the petition for writ of habeas corpus filed by appellee before him;

(2) That the Honorable Michael J. Roche, United States District Judge for the Northern

District of California, erred when he ordered the appellee discharged from the custody of the appellant;

(3) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have held that a deserter from the United States Marine Corps, who fraudulently enlists in the United States Navy, is amenable to prosecution for his desertion from the United States Marine Corps;

(4) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred in holding that the United States Naval authorities and Naval Court had no jurisdiction over the person of the appellee;

(5) That the sentence imposed against the appellee by the General Court Martial convened at the Naval Training Station and Distribution Center, San Francisco, California, on January 5, 1946, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

Dated: July 3, 1946.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States At-
torney,
Attorneys for Appellant.

[Endorsed]: Filed July 2, 1946. Paul P. O'Brien,
Clerk.

